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MINORITY REPORT

OF THE

SPECIAL COMMITTEE,

TO WHOM WAS REFERRED SO MUCH OF

THE GOVERNOR'S MESSAGE

AS RELATES TO

THE PUBLIC LANDS.

REPORT.

BY THE HOUSE OF DELEGATES,

February 17, 1841.

Read and 666 copies ordered to be printed.

The undersigned, members of the committee to whom was referred that part of the Governor's message which relates to the public lands, beg leave to present their own views, lest it might be inferred that they concur with the majority of that committee in the opinions and reasonings contained in their report. Before we proceed to examine the subject, we are compelled to notice an attack, made in the outset of that report upon the Governor of our State, which, neither the character of that officer, nor the respect due to the office itself, can, in the remotest degree, justify. It seems to be considered, by the majority of that committee, that the unbiassed judgment of one, constituting an independent branch of State Government, must not be expressed, when at variance with the majority of the House of Delegates, because he thereby may "forestal legislative action;" well knowing, as they must have done, that the independence of the people's representatives, if true to their responsibilities, must of necessity place such alleged interference at defiance.

Strange is the inconsistency in which the majority of the committee involve themselves, when, in the early portion of their report, they upbraid the Governor for a supposed interference, by the free expression of his judgment in relation to the subject immediately before them, when having indulged their disposition to censure in this aspect of the case, they continue the attack, because, in the equally undoubted "absence of consti-

tutional obligation," he has not suggested some mode of relief to the embarrassed treasury. It is a doctrine novel in the affairs of human conduct, that a disregard of pecuniary inducement and an elevation above the appeals of cupidity, should be construed into an abandonment of State pride, when, by a solicism in language, the pursuit of money is regarded as an evidence of the willingness to support the chivalry of our forefathers. We greatly mistake the intelligence which we believe justly belongs to the citizens of this State, if they fail to perceive that it is intended to win Maryland from the high ground which she has always proudly occupied, of resisting the "rapacious spirit" which seeks to share the spoils incident to distribution, by changing her position from fearless assertion that the lands "should be considered as common property," because now, in her embarrassments, is extended the bribe of a golden placebo. The undersigned yield to none in their veneration for the deeds of valor achieved by the arms of Maryland in the contest of the Revolution, and would cheerfully abide the trial before the people of this State, whether the relinquishment of distributive shares betrays any want, on their part, of the characteristic virtues of our forefathers; or whether it was even considered, in Maryland, a high position to endanger the Union by refusing to sign the articles of confederation, until she had secured the claims which should, in in after times, save her from insolvency. Is it not manifest, on the contrary, that her sense of right was shocked, and her delicate sense of honor wounded, that in the National Councils the scramble should begin, which now is to be carried out, as to the respective amounts each State is to receive of the waste territory, when the whole had been won from a common enemy, by the bravery alike of all. We are free to declare that, if the views submitted by the majority of the committee did control the councils of Maryland, and induce her to withhold her consent till the latest hour, we would seek to veil rather than unfold that portion of her history, but we are strong in the belief that the committee will find that facts do not bear them out.

We shall now proceed at once to the investigation of the subject. The question of the public lands has been so recently discussed by men more capable than the undersigned of explaining the titles by which they are now held, that they do not deem it necessary to go back to the discoveries of John

Cabot or Christopher Columbus, or to do any thing more than to point out what appears to be erroneous and inconsistent in the report of the majority of the committee. Holding the same opinions as those expressed in the able and lucid message submitted by the Governor at the commencement of the present session, which have not been, as we confidently assert, successfully controverted, we do not intend to advance any new doctrine, or to enlarge the discussion beyond the limits to which he has properly confined it; contenting ourselves if, in our attempt to sustain, we do not weaken the strong grounds on which he rests his argument. We find the majority of the committee contending, in the first place, "that at this time (the conclusion of the war) all the unsettled vacant lands within the boundaries prescribed in the treaty cited, became the common property of the States that had won them by the sword, unsustained by grants and charters that could not outlive the authority in which they originated." According to this doctrine, the unsettled vacant lands in this State, which now form Washington and Allegany counties did not belong to the State of Maryland, because it had been won by the thirteen States, and had become their common property in disregard of the "grants and charters which could not outlive the authority in which they originated." The majority of the committee however subsequently ask, "what power did Congress derive from these cessions or the treaty with Great Britain? We answer, the power of a trustee bound to the especial observance of the conditions of a trust. At this period there was no such political confederation as the General Government. In the treaty of 1783, Great Britain treats not with the Congress in confederation, but with the States as such, distinctly naming them, and to the States, co nominee, ceded all the territory." The report, in the first part of this extract, agrees with the opinion of the Governor, that the title to the western territory, was derived from the deeds of cession, *and* the treaty of peace, or the right of conquest. The coincidence however appears to be accidental; for, in following out the idea, the report is again at variance with the message, and with the highest judicial and historical authorities. "At this period (says the report) there was no such political confederation as the General Government." It so happens that, at that precise period, (the conclusion of the war,) there was such a confederation as the General Government, which afterwards gave place

to the "more perfect union" formed by the constitution. Judge Story, in vol. 1, page 207 of his Commentaries, states, that even before the ratification of the confederation, "Congress possessed, by the consent of the people of the United States, sovereign and supreme powers, for national purposes." The General Government, under the confederation, could therefore not only treat with Great Britain, but *did* actually conclude the treaty of peace; and in that treaty the "States, as such," were not distinctly named; nor does Great Britain cede to the States, eo nomine, all or any part of the territory, as stated in the report of the majority: on the contrary, it is called a "treaty of peace between his Britannic Majesty and *the United States of America*," and thus are the parties described throughout the whole instrument. Perhaps the committee considered that as the *United States* included all the States, the treaty, in naming the first, distinctly named every State; and if this were the meaning of the committee, it would have been more convenient, as a matter of reference, if it had been so explained in the report.

It is stated by the committee that "New York, non obstante, "the intimation of his Excellency, that no deed looked to an exclusive application of this fund, expressly states in her legislative cession, that a portion of the contested territory ought to be appropriated as a common fund for the expenses of the war." The part of the Governor's message to which this extract refers, contains the distinct assertion, and not an intimation, that "in none of the deeds of cession is there to be found a reservation of this fund to the separate use of the different members of the Union; or any stipulation that it should be applied exclusively to the payment of the public debt; or is there the slightest intimation that it was to be distributed among the States for any purpose whatever."

The majority of the committee attempt to show that the Governor was mistaken, by referring to what they call the *legislative* cession of New York, which is an act of Assembly, passed the 7th of March, 1780, in which the words quoted by the committee are to be found. But the deed of cession from that State, was executed the 1st March, 1781, and contains no stipulation whatever in reference to the public debt or the expenses of the war. As the passage quoted from the act of Assembly is omitted in the deed, it may be fairly inferred that Congress would not consent to a condition which would

limit the purpose to which the fund was to be applied. As stated in the Governor's message, none of the deeds of cession contain a stipulation or condition of this kind, *non obstante* the reference to the *legislative* cession of New York.

A passage from Judge Story is quoted by the committee to show that the public lands, after the discharge of the national debt, may be applied to the "cause of education and internal improvements." The extract concludes with these words: "the constitutional objection to the appropriation of the other revenues of the General Government to such objects has not been supposed to apply to an appropriation of the proceeds of the public lands." A careless reader might infer from this extract, that Judge Story was of opinion that Congress had the power to *distribute* the proceeds of the public lands among the States, to be applied by the State Legislature to purposes of internal improvement and education: but there is no such opinion in his whole book.

In the passage quoted, he is treating of the *powers of Congress;* and in other parts of his commentaries he expresses the opinion that Congress has the power to apply the *ordinary* revenue to these purposes.

In this very passage he considers the proceeds of the lands as the revenue of the General Government; and if the committee had given the whole paragraph, his opinions might have been more clearly understood.

In the conclusion of that paragraph, he states that the cessions of that territory were expressly made for the *common benefit of the United States*, and therefore constitute a fund which may properly be devoted to any objects which are for *the common benefit of the Union.*

So far as Judge Story's opinions are entitled to weight, this last sentence takes away the ground assumed by the friends of distribution, that after the discharge of the public debt, this fund belonged to the States, for he expressly states that, *after the payment of the debt*, it may be properly devoted to any objects which are for the *common benefit* of the Union. Judge Story does not make a difference himself between the revenue from the public lands and from other sources, because *he* considers them all applicable to what *he* considers constitutional objects; but he refers to the opinions of others, when he remarks that the constitutional objection to the appropriation of *the other revenues* of the Government, has not been supposed to apply to the proceeds of the public lands.

The report states, that "the resolution of Congress recommending cessions by the States, looked to the public lands as a fund from which the expenses in maintaining and acquiring this territory, should be reimbursed." If this were correct, no distribution could take place till these expenses were reimbursed; and down to the present time, the expenditures have been many millions more than the receipts. But though it was a condition that the States should be indemnified for the expenses incurred by them respectively before the cession, yet the resolution of Congress proposed no mode of applying the fund, except that the land itself should be disposed of for the *common* benefit of the United States. Judge Story, in the same vol. page 186, declares "that to induce them (the States) to make liberal cessions, Congress declared that the ceded territory should be disposed of for the *common benefit of the union.*

The same writer in page 186, quotes the opinion of Mr. Madison, delivered in 1788, that the fund arising from the public land, though it is not of such a nature as to extricate the United States from their present distress, or for some time to come, to yield any regular supplies for the public expenses, yet it must hereafter be able, under proper management, both to effect a general discharge of the domestic debt and to furnish for a certain period, *liberal tributes to the federal treasury.*

Other passages are quoted by the Governor, from the same number of the Federalist, which, as well as those now copied from Judge Story, show conclusively, that Mr. Madison, in 1788, four years after the cession by Virginia, considered the land fund a national stock, and that it was applicable to the debt and *expenses* of the General Government, and that after the payment of the public debt, it would furnish, for a certain period, that is, till it was exhausted, *liberal tributes to the federal treasury.* Virginia had ceded more liberally than any other state in the union; and it was in her deed of cession that it was declared, that the lands were ceded for the common benefit of the United States, according to their respective proportions of the general charge and expenditure. Mr. Madison was one of the ablest representatives of Virginia in the Congress of the confederation, and in the convention that formed the constitution; he was intimately acquainted with the subject of the public lands, and with the claims of the General Government and the States; he knew the views and intentions of

his own State in transferring her title to the Union; the whole subject had been discussed in the Congress of the confederation and in the convention, yet in recommending the adoption of the constitution, he expressly declares, that after the discharge of the public debt, the sales of the public territory would furnish *liberal tributes to the federal treasury.* If Virginia, among other States, had possessed the slightest residuary interest in this fund, could Mr. Madison have been ignorant of it, or could he have spoken of it as yielding regular supplies for the *public expenses*, or as furnishing "liberal tributes to the federal treasury?"

The majority of the committee quote from General Washington's speech to Congress in 1791, the following paragraph: "A provision for the sale of the vacant lands in the United States is particularly urged, among other reasons, by the important consideration, that they are pledged as a fund for reimbursing the public debt.

Congress passed, the 4th of August, 1790, an act, which provided "that the proceeds of the public lands in the Western territory, now belonging, or that may hereafter belong to the United States, shall be, and are hereby appropriated towards sinking, or discharging the debts, for the payment whereof the United States now are, or by virtue of this act, may be holders, and shall be applied solely to that use until the said debt shall be fully satisfied."

Is it possible that the committee should infer, from the circumstance, that General Washington recommended a provision for the immediate sale of the lands for that purpose, that he recognised any residuary claim of the States, or expressed the opinion, that this fund was pledged in pursuance of the deeds of cession? If the public lands had been conveyed to the general Government to pay the public debt, there would have been no necessity for an additional pledge by Congress; and in that case, the act would have merely recited the conditions of the deeds of cession and provided for the proper application of the fund as it came into the Treasury.

The act of Congress claims the public lands as the *property of the United States*, and appropriates the proceeds to the discharge of the public debt, in the same manner as the revenue from any other source might have been appropriated to the same purpose; or that particular fund might have been applied to any

other object within the constitutional powers of the General Government.

The fourth article of the Constitution has been relied on, to prove that Congress has greater power over the proceeds of the public lands than over the ordinary revenue of the General Government.

That article declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States, and nothing *in* this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." The committee only copy enough of it to show "that Congress shall have power to *dispose* of the public territory."

The committee make some interesting commentaries upon this article, and state very clearly what might have been the effect of a disruption of the confederated States, but there is some doubt as to the construction of the article, inasmuch as no disruption has taken place. It certainly gave no power to Congress to violate the conditions of the deeds of cession, or to prejudice the claims of the United States, or of any particular State, or to apply the *proceeds* of the public lands to any other than constitutional objects. In adjusting this article, a favorable opportunity was offered, of supplying any defect, or omission in the deeds of cession, and of securing to the separate States their distributive shares of this fund; but it does not appear from the debates in the convention, that the representatives of Maryland, or of any other State, were aware of the rights which, according to the report of the committee, they had been gallantly contending for in the midst of the Revolution.

It is now necessary to consider the character which the majority of the committee have assigned to the General Government, as a trustee for the States. It is contended in the report "that the rights created by the pen were dissolved by the sword;" that the titles of the States to the lands lying within their respective limits, were superceded by the right of conquest and could not outlive the authority in which they originated." It follows therefore as a necessary consequence, that the unsettled lands, lying in each State did not belong to that particular State, but to all the States; and "as no General Government, properly so called, existed at that period," the title became vested in the different members of the Union.

The United States acquired a title to the public domain by the treaty of peace, the deeds of cession, the purchase from France and Spain, and by extinguishing the prior titles of the Indian Tribes to all that portion of the soil which has been brought into the market. If the title thus acquired be not complete, the General Government cannot hold territory by *any* title; and that part of the constitution which provides, that Congress shall have certain power over the *territory belonging to the United States*, and that nothing in that instrument shall be so construed as to prejudice the claims of the United States, or any particular State, is a perfect nulity because no such claim could possibly exist.

It is now contended that the limited States have no claim, that they are acting merely as a trustee; that, in that capacity they must continue to purchase the Indian titles, to survey and sell the land, defray all expenses and pay the whole gross proceeds into the treasuries of the different States.

And all this is required of the General Government, when it is contended by the advocates of the distribution, that the National Treasury is in a state of bankruptcy; when it is admitted by all, that the national revenue is not more than equal to the annual expenditure; and when our differences with Great Britain may soon make it necessary to place the whole country in a state of defence. If the States had the power of conferring or forcing a trust of this kind upon a foreign enemy, they might safely expect a continuance peace; for no nation could venture to encounter their hostility, while threatened with the dreadful penalty of becoming their trustee.

The majority of the committee, in describing the position of Maryland, proudly remark, that a "high moral conviction of duty would not permit the sages of the State to abandon her rights through the chances of a doubtful war—the State herself might fail, and her claims be forever extinguished. Your committee may be permitted here to indicate the contrast Maryland now presents, to the truth, firmness and pride of her position then."

Throughout their report, the committee endeavor to show, that the Governor has abandoned the high position occupied by the sages of the State; and that his message presents a melancholy contrast to the dignified attitude assumed by themselves. As the undersigned concur in the opinions expressed in the message, they consider it their duty to show that the policy, of

which they are the advocates, is not the reverse of truth, firmness and State pride; and that it is not inconsistent with the position assumed by the "sages of Maryland" during the Revolutionary war. The ground she maintained at that time, and during the confederation, was in direct opposition to the views contained in the report of the majority of the committee. They then contended that the crown lands, "if wrested from the common enemy by the blood and treasure of the thirteen States, ought to be deemed a *common* property, subject to the disposition of Congress, for the general good;" that the country, unsettled at the commencement of the war, claimed by the British crown, and ceded to it by the treaty of Paris, should be considered a common property, subject to be parcelled out by Congress, into free, convenient and independent States.

The last two objects in view, the first and most important of which was to preserve something like an equality among the members of the Union, by reducing the limits of Virginia and other large States, and forming the territory claimed by them, into distinct and independent States. Her next object was to resist the exclusive claims of the large States to the crown lands within their respective limits, and to place them under the *disposition of Congress*, for the general good. The sages of Maryland had then no desire to place the proceeds of the public territory under the disposition of the State Legislatures for the separate benefit of the States.

The majority of the committee, as if for the very purpose of refuting their own opinions, refer to the debates in the convention of 1787, from which it appears that Mr. Madison proposed to give to Congress the power to dispose of the unappropriated lands of the United States, and that Luther Martin then moved to take up the amendment, which provided "that nothing in this constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the treaty of peace."

Mr. Martin was one of the sages of Maryland, and one of the most eminent advocates of her rights, yet *he* considered the vacant territory as belonging to the United States. Perhaps the majority of the committee consider the States in their several capacities, and the *United States* as the same; and that to name the latter is "distinctly" to name each particular State. If they were identical, it would make very little difference whether a particular fund were placed under the control of Congress, or the State Legislatures.

But the General Government and the Government of the States have been established by the people for different purposes; and have been invested with different powers; and there is no authority in Congress to transfer the national revenue to the State Treasuries, to be expended under State appropriations.

The United States include some thing more than the States, according to the opinion of the Supreme Court, quoted by Judge Story, in vol. 2, page 463 of his commentaries, the District of Columbia, and the different Territories, are as much within the United States, as Maryland or Pennsylvania. The people residing in the District and Territories, are subject to the same taxes that are laid upon the people of the States. They have contributed their portion of the fund derived from import duties, with which the purchase of Florida and Louisiana was paid; and if there is to be a distribution of the proceeds of the lands purchased from France and Spain, the District of Columbia and the Territories, are as much entitled to a distributive share, as any of the States.

The undersigned do not agree in opinion with the majority of the committee, that the prosecution of a claim against the General Government, for any part of the national revenue, is an evidence of State pride, but if, in differing with the committee, they have fallen into error, they would then respectfully suggest, that Maryland will act more wisely by giving some evidence of her justice.

She cannot deprive the General Government of the proceeds of the public lands, without subjecting her own citizens to taxes, greater in amount, than her distributive share of that fund. She is now in a more exposed and defenceless condition than any other State in the Union; and her interest is not likely to be promoted by weakening the resources of the United States, "the broad circumference of whose shield" was intended to guard the States and the people from every foreign invader.

BENJAMIN C. PRESSTMAN,
JAMES L. MARTIN.